

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

William C.

Claimant,

vs.

EAST LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Case No. 2011100709

DECISION

Michael A. Scarlett, Administrative Law Judge (ALJ) Office of Administrative Hearings, State of California, heard this matter at the East Los Angeles Regional Center, in Alhambra, California, on November 16, 2011.

Judy Castaneda, Fair Hearing Coordinator, represented East Los Angeles Regional Center (ELARC or the Service Agency.) Carolina C., Claimant's mother (Mother), represented William C. (claimant).¹ Paola Gazzaneo, court interpreter, translated the proceeding from English into Spanish on behalf of Mother.

Oral and documentary evidence was received and the record was closed and the case was submitted for decision on November 16, 2011.

ISSUE

The parties agreed that the following issue is to be decided by the ALJ:

May the Service Agency reduce claimant's in-home respite hours provided by Cordova Consulting from 24 hours per month to eight (8) hours per month?

¹ Claimant and his family are referred to by their initials or family titles to protect their confidentiality.

FACTUAL FINDINGS

1. Claimant is a 13 year-old boy who lives at home with his biological parents and three siblings. He was found eligible for ELARC services based upon a diagnosis of autism. Claimant is fully ambulatory and does not exhibit any physical limitations. He is described as being in good medical and dental health. Claimant is able to perform most self-help tasks independently. He is able to feed himself using utensils, toilets independently, and is proficient at hygiene tasks such as brushing his teeth, dressing and bathing. Claimant's social skills were described "greatly improved," although still "quite shy," in the last Individual Program Plan (IPP) dated September 8, 2011. He is able to focus on a preferred task for more than 30 minutes, he initiates and maintains interaction with others in a familiar setting, and is able to use more than 30 words to communicate and form complete sentences. Claimant is expressive in his communication skills, has a lot of friends and communicates with them through text messaging, cell phones, and "Face book." Claimant is able to use the computer and the internet. There were no atypical, maladaptive or aggressive behaviors attributed to claimant in the September 8, 2011 IPP.

2. Service Agency provides claimant 24 hours per-month of in-home respite services through Cordova Consulting. Cordova hires claimant's grandmother to provide the respite services. Service Agency also funds 21 days of out-of-home respite care. Claimant was offered DIR/Floortime Services and Socialization Training but these services were declined by Mother. However, pursuant to the September 8, 2011 IPP, Service Agency determined claimant's monthly in-home respite should be reduced to eight hours per month because claimant and his family did not meet the criteria under the Service Agency's Purchase of Service Guidelines (POS) for 24 hours per month of in-home respite services. Claimant attends KIPP Los Angeles College Prep in Los Angeles Unified School District (LAUSD) Monday through Friday from 7:30 a.m. to 5:00 p.m. He is enrolled in an 8th grade General Education class, and is provided 30 minutes per week of occupational therapy and 30 minutes per week of speech therapy by LAUSD. He also receives RSP services for Math, Reading and Writing.

3. On September 19, 2011, Service Agency sent claimant a Notice of Proposed Action (NOPA), notifying claimant's Mother that it was reducing claimant's in-home respite services from 24 hours per month to eight hours per month. The NOPA stated that Service Agency reduced the respite hours pursuant to the Regional Center's POS Guidelines and Welfare and Institution Code, section 4686.5.

4. Claimant's Mother contends that if Service Agency reduces the in-home respite to eight hours per month she can not continue to attend health and nutrition classes and conferences on autism that she has used to enhance her personal growth and education in the area of autism. She believes that the knowledge she has obtained in attending these classes and conferences has assisted her tremendously in treating and helping claimant cope with the affects of his developmental disability.

5. In determining that eight hours per month was the appropriate level of in-home respite services, Service Agency relied upon the “Reference Guide for Respite Levels of Services” in the POS Guidelines, approved by the Department of Developmental Services (DDS) and effective as of January 31, 2011. The POS Reference Guide describes seven (7) levels for in-home respite services, Levels A through G, with corresponding monthly hours of respite authorization. The monthly hours for each level are as follows: Level A (four hours); Level B (eight hours); Level C (12 hours); Level D (18 hours); Level E (24 hours); Level F (30 hours); and Level G (more than 30 hours). Each service level has five categories that include factors upon which a determination is made as to the appropriate hours of monthly respite. The categories are: (1) Medical, (2) Behavioral, (3) Self-Care, (4) Care Giver Condition, and (5) Family Stress Factors. Claimant must satisfy at least one or more of the categories, and the factors therein, to be authorized for the respite hours specified for that in-home respite service level.

6. Service agency determined that the appropriate level of in-home respite for claimant’s family was service Level B, for eight hours of monthly in-home respite. Level B specifies the following five categories and factors, of which one or more must be present to authorize eight hours of monthly respite:

B(1) Medical: consumer must have medical condition(s) requiring ongoing supervision beyond age expectations, e.g., requires equipment periodically, frequent hospitalizations and severe uncontrolled seizures;

B(2) Behavioral: consumer demonstrates intermittent challenging or atypical behavior(s) beyond age expectations, e.g., aggression, self-abuse, disruptive/destructive behaviors, extreme irritability and atypical behavior related to a psychiatric diagnosis;

B(3) Self-Care: consumer requires constant prompting or assistance in two or more self-care areas beyond typical age expectations or physical challenges beyond age expectations;

B(4) Care Giver Condition: single parent with limited social supports, or adolescent parent, or aged parent, or parent diagnosed with a developmental disability, or care giver has a physical, psychiatric or medical condition causing more difficulty in caring for consumer;

B(5) Family Stress Factors: family is experiencing significant disruption related to the consumer’s disability, or care giver requires hours to attend regular support groups or counseling.

Service Agency determined that claimant's family met one of the categories and factors in Level B, the Family Stress Factors category B(5).² Claimant satisfied Level B and category B(5) because Mother has been attending health and nutrition classes and autism conferences to enhance Mother's "personal growth" and education to assist her in addressing claimant's needs associated with his developmental disability.

7. Service Agency determined that claimant and family did not meet the criteria for authorization of respite hours under Level C, the next service level that provided for 12 hours of monthly respite. Level C provides that the family must satisfy at least one or more of the following categories and attendant factors:

C(1) Medical: consumer is fragile and requires care on a periodic basis during the day, e.g., gastrostomy tube feedings, occasional suctioning, injections and luminary treatments;

C(2) Behavioral: consumer demonstrates ongoing challenging behavior or atypical behavior(s) beyond age expectations, e.g. aggression, self-abuse, disruptive/destructive behaviors, extreme irritability and atypical behavior related to a psychiatric diagnosis;

C(3) Self-Care: consumer has chronic medical need and physical needs requiring total care, e.g., personal hygiene, eating/feeding, bathing and dressing;

C(4) Care Giver Condition: care giver has physical, psychiatric or medical condition requiring frequent treatment; or care giver has a chronic physical, psychiatric or medical issue which impacts his/her ability to care for the consumer; or care giver is caring for another family member who is elderly or has a chronic and significant medical or physical condition; or primary care giver with no assistance experiences sleep disruption for up to one hour every night, which is beyond developmental the expectations for the child's age;

C(5) Family Stress Factors: two or more consumers in the family; or consumer is at risk of being abused; or family is receiving counseling for stress-related issues.

8. According to claimant's last IPP dated September 8, 2011, his medical condition did not meet the criteria under category C(1) of Level C. Claimant's was described as being

² Service Agency determined that claimant's family met the criteria for Level A of the Reference Guide for Respite Levels of Services based upon meeting the A(1) Medical category: consumer has special medical needs, excluding follow-up and/or therapy appointments (claimant has allergies associated with animal dandruff); and A(2) Behavioral: consumer's behavior is difficult to manage, e.g. resistance, tantrums, etc. (claimant engages in sibling fights and disputes). We need not include the other three categories in Level A that claimant did not meet because he satisfied at least one category and therefore was authorized to receive Level A hours of respite service.

in “good medical and dental condition” and reported by Mother to be in good health. Category C(1) requires claimant to be “medically fragile,” a condition not supported by the IPP or Mother’s testimony. Claimant’s behavior or social skills, relevant to category C(2), was described as being “greatly improved.” Although shy, the IPP indicated that claimant was getting along well with his friends and there was no indication that he possessed aggressive, atypical, or maladaptive behaviors. In fact, Mother declined services offered by the Service Agency for socialization training and behavior modification. Category C(3), self-care factors, was also not met. Claimant was described in the IPP as being “independent” in relation to self-help skills, such as toileting, personal hygiene and dressing, and feeding himself, etc. It can not be concluded that he needs “total care” due to chronic medical or physical needs as required under Level C category C(3). Claimant’s care giver, his Mother, also did not meet any of the criteria described in Level C, category C(4). Finally, claimant presented no evidence that Level C, category C(5) factors were present in this case.

9. Because claimant failed to meet the criteria for authorization under Level C in-home respite hours, it is not necessary to consider whether he has met the criteria for Levels D through G. These levels require claimant to possess more severe medical, behavioral, self-care needs than does Level C, and the care giver condition and family stress factors are equally more demanding to meet than Level C.

10. Mother does not argue that claimant has met or satisfied any of the criteria or factors described in the POS Reference Guide Levels C through G. Mother essentially argues the respite hour reduction was excessive. She did not dispute the accuracy of information in the September 8, 2011 IPP, and agrees that claimant is in good medical health, has relatively minor behavioral needs, and is independent as to his self-help skills. However, Mother attributes claimant’s success to the personal growth and education she gained through classes and conferences which she has applied treating claimant’s autism. Mother states that the health and nutrition classes, primarily through her involvement as a representative with the Amway Company, informed her about nutritional supplements that have been very beneficial to claimant both physically and emotionally. Mother attends these classes approximately four times per month, for two to three hours each class. Mother uses her respite hours to attend these classes, the library, and less often, conferences on treating autistic children.

11. Mother is unable to take claimant to the classes or conferences because he becomes impatient after two hours. Claimant’s grandmother, who is the respite provider, would also be unavailable if the respite hours are significantly reduced because the grandmother would need to replace the lost hours with other work as a caregiver to supplement her income. Grandmother also sometimes attends the classes and conferences with Mother.

LEGAL CONCLUSIONS

1. Claimant's appeal of the Service Agency's decision to reduce in-home respite services was timely filed and thus proper jurisdiction to proceed with this hearing was established.

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) The Service Agency seeks to terminate a service it previously funded and therefore has the burden to demonstrate that its decision is correct. Service Agency has the burden to show that the reduction of in-home respite services for claimant was appropriate. Service Agency bears the burden of proving, by a preponderance of the evidence, that in-home respite services reduced are appropriate. (*See* Evid. Code, § 115.)

3. Claimant's appeal is governed by the Lanterman Developmental Disabilities Services Act (Lanterman Act.) (Welf. & Inst. Code, §§ 4500 et seq.)³ Under the Lanterman Act, the Service Agency is required to secure services and supports that meet the needs of a person found eligible for services based upon a qualifying developmental disability. (Welf. & Inst. Code, § 4501.) Sufficient services and supports should be established to meet the needs and choices of the consumer, regardless of age or degree of disability, to support their integration into the community. (*Id.*) In providing these services, consumers and their families, when appropriate, should participate in decisions affecting their own lives, including the planning and implementation of services provided by the Service Agency. (*Id.*)

4. Section 4690.2, subdivision (a) provides in relevant part that:

"In-home respite services" means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home, for a regional center client who resides with a family member. These services are designed to do all of the following:

(1) Assist family members in maintaining the client at home.

(2) Provide appropriate care and supervision to ensure the client's safety in the absence of family members.

(3) Relieve family members from the constantly demanding responsibility of caring for the client.

(4) Attend to the client's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family

³ All further statutory references are to the Welfare and Institutions Code.

members.”

5. Section 4686.5, subdivision (a) provides in relevant part that:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

(2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.

6. Service Agency asserts that it was justified in reducing claimant’s in-home respite services because under its POS Guidelines, claimant is entitled to only eight hours per month of in-home respite services based upon claimant’s September 8, 2011 IPP and the factors required to be considered under its POS Guidelines for authorization of respite services. Service Agency may promulgate POS Guidelines to assist in providing the appropriate level of services and supports to the consumer. (Welf. & Inst. Code, § 4646.4, subd. (a).) To be effective, the POS Guidelines must be approved by the Department of Developmental Services (DDS). (Welf. & Inst. Code, §§ 4646.4, subd. (a)(1); 4434, subd. (d).) Here, effective January 31, 2011, Service Agency’s POS Guidelines, including the Reference Guide For Respite Level Services therein, was approved by DDS on January 31, 2011. Accordingly, Service Agency may apply its POS Guidelines to determine an appropriate level of in-home respite.

7. Mother admitted at hearing that claimant is in good medical health, that he does not present with aggressive behavioral issues, and that he is sufficiently independent in his self-help skills such as feeding himself, personal hygiene, dressing himself, and toileting. She essentially agreed with the assessment of claimant in the September 8, 2011 IPP. Based upon the assessment of claimant’s medical health, behaviors, self-help skills, and the absence of evidence that Mother’s condition as care giver was impaired in any way or that claimant’s family was experiencing significant stress as a result off claimant’s disability or otherwise, Service Agency appropriately determined that claimant fell within Level B of the POS Guidelines Reference Guide for Respite Service Levels, by reason of Factual Findings 5 through 7.

8. Mother introduced compelling evidence that she has educated herself on how to treat a child with autism through attending classes on health and nutrition and conferences on autism. Her attempts enhance her personal knowledge and growth to better understand autism and its effects on claimant are commendable and encouraged. However, in-home respite is designed to relieve family members of the constant demand of caring for a consumer with a developmental disability, to attend to self-help needs and activities of daily

living that are ordinarily performed by a family member, to provide care and supervision of the consumer in the absence of family members, all with the intent of assisting the family in maintaining the consumer within the family home. (*See* Welf. § Inst. Code, § 4660.2.) Mother's request for additional respite to attend classes and conferences for her own personal growth and education, although a consideration for the provision of in-home respite, is not the primary purpose for providing in-home respite care. Service Agency considered Mother's need to attend classes and conferences in determining that claimant was entitled to eight hours per month of respite services under Level B of the POS Guidelines. Service Level B(5) specifically references the care giver's need to "attend regular support groups or counseling" as a factor or criterion that would qualify, and did qualify, claimant for the Level B monthly hours of respite. There was insufficient evidence to support the authorization of in-home respite services beyond the eight hours provided for in Level B.

9. Given that claimant's medical, behavioral, daily living needs are relatively minor at this time, Mother is not experiencing any physical or medical limitations as claimant's primary care giver, and there appears to be no significant family stress factors, the Service Agency's determination that claimant's in-home respite hours should be reduced from 24 hours per month to eight hours per month pursuant to the POS Guidelines is appropriate.

ORDER

Claimant William C.'s appeal of the Service Agency's decision to reduce in-home respite hours from 24 hours per month to eight hours per month is denied. Service Agency may reduce the in-home respite hours to eight hours per month pursuant to its POS Reference Guide for Respite Levels of Service.

IT IS SO ORDERED.

DATED: December 8, 2011

MICHAEL A. SCARLETT
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.